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Supreme Court of the United States, October Term 2014 Preview

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**GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE**

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2014 PREVIEW

September 2014

A LOOK AHEAD AT OCTOBER TERM 2014

This report previews the Supreme Court's argument docket for October Term 2014 (OT 2014). The Court has thus far accepted 40 cases for review, or roughly half the cases that will likely be decided in OT 2014. Section I discusses some especially noteworthy cases on the Court's argument docket. Section II organizes the 2014 Term cases into subject-matter categories and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

This Term could be among the most momentous in recent history. Petitions for certiorari have been filed by five states raising the question whether prohibitions on same-sex marriage are constitutional. If, as seems likely, the Court agrees to decide that issue, it will be an historic term.

Another issue of major importance that may be granted this Term is whether persons who obtain health insurance on the federal exchanges are eligible for subsidies. There is already a petition for certiorari from the Fourth Circuit's decision approving the subsidies, and the D.C. Circuit recently granted rehearing en banc to resolve the question. It is uncertain whether the Court will hear the case this Term, or even whether the Court will opt to hear it at all. But if the Court does take the case, it will be another blockbuster.

The University of Texas's race-based admissions policy also may be on its way back to the Court. After the Supreme Court sent the case back to the Fifth Circuit for review under the strict scrutiny standard, a panel of the Fifth Circuit once again upheld the policy. A petition for rehearing en banc is pending in the Fifth Circuit, so the case may not reach the Court this Term. But if rehearing en banc is denied in the near future, there might be time for the case to be decided this Term. There is no guarantee that the Court will take the case, but if it does, the fate of affirmative action in higher education will be at stake.

Also on the horizon are challenges to new restrictions that states have imposed on the right to obtain an abortion. Some states make it illegal for doctors to prescribe an abortion-inducing drug beyond the seventh week of pregnancy. Others require abortion facilities to meet the same physical standards as outpatient surgical centers, or mandate that doctors at such facilities have hospital admitting privileges. Challenges to these restrictions have begun to make their way through the courts and could conceivably reach the Court this Term. If they do, the Court will have to decide whether the restrictions impose an undue burden on the right to choose an abortion, a test that is anything but clear in its application to laws that make it more difficult to obtain, but do not absolutely prohibit, an abortion.

Putting to one side the cases on the horizon, this Term offers little in the way of excitement. But of the cases granted thus far, here are the highlights:

Elonis v. United States (13-983)

The First Amendment does not give a person a right to make a "true threat" of death or serious bodily harm, but does protect hyperbole, caustic remarks, or verbal attacks that fall short of a true threat. This case raises the question of what the government must prove to convict someone of making a true threat. Must the government prove that the speaker subjectively intended to communicate a true threat, or is it sufficient to show that a reasonable person would understand the statement as a true threat?

The issue arises in the context of postings on social media. After his ex-wife obtained a restraining order against him, Anthony Elonis made a series of posts on Facebook. In one, he

said “Fold up your [protective order] and put it in your pocket. Is it thick enough to stop a bullet?” In another, he said there were “enough elementary schools in a ten-mile radius to initiate the most heinous school shooting ever . . . the only question is which one.” And in another he said, after a visit from the FBI, “the next time you knock, [I will] touch the detonator in my pocket and we’re all going boom.” The district court instructed the jury that it should find petitioner guilty if he intentionally made a statement that a reasonable person would foresee would be interpreted by those to whom it was communicated as a serious expression of an intention to inflict bodily injury or take the life of an individual. Elonis was convicted, and his conviction was affirmed.

Elonis does not dispute that there was sufficient evidence for the jury to find that a reasonable person would foresee that his statements would be understood as a serious expression of an intent to inflict bodily injury or death. He argues, however, that it was also necessary for the jury to find that he subjectively intended for his statements to be understood as true threats. The First Amendment question is a difficult one. On the one hand, as Elonis argues, the First Amendment sometimes requires the government to prove that the defendant subjectively intended for his speech to have harmful consequences, lest a person who intends to engage in protected speech be convicted simply because he was negligent in failing to foresee the impact of his speech on others. Elonis further argues that there is a special danger of chilling protected speech on the internet, where, because of the absence of context, venting emotions may easily be misinterpreted as a true threat. On the other hand, as the government argues, communications that are objectively understood as true threats can terrorize their targets, regardless of the speaker’s subjective intent. Because there is much to be said for both sides, it is difficult to know where the Court will come out should it reach the First Amendment issue.

The Court, however, has given itself a way out this dilemma. At the cert stage, it added the question whether the threat statute itself requires the government to prove that the defendant subjectively intended for his communication to be understood as a true threat. Lower courts have rejected an intent requirement as lacking any textual basis. But there is a strong presumption that criminal statutes require proof of intent on all elements of a crime that distinguish innocent from guilty conduct. And the absence of an intent requirement surely raises a serious constitutional question under the First Amendment. The Court may therefore well decide that the statute itself requires proof of subjective intent.

Zivotofsky v. Kerry (No. 13-628)

The Executive Branch has long maintained a policy of not recognizing any country’s sovereignty over Jerusalem. Pursuant to that policy, the State Department lists Jerusalem, rather than Israel, as the place of birth on the passports of United States citizens born in Jerusalem. Congress, however, enacted a law that requires the State Department to honor the request of any United States citizen born in Jerusalem to list Israel as his place of birth. The President has refused to enforce that statutory requirement, claiming that it interferes with his exclusive power to recognize a foreign government. When Zivotofsky’s parents requested that their son’s passport list Israel as his birthplace, the State Department accordingly refused to honor that request. A lawsuit followed raising the question whether Congress or the President has the final say on whether someone born in Jerusalem may list Israel as his place of birth on his passport.

An easy way out of this conundrum would have been to hold that the question was a political question to be worked out between the legislative and executive branches. But when the case first came to the Court in 2011, it held that question was not a political one, but one that had

to be determined by the courts. So now the Court must pick a side. The court of appeals sided with the President, holding that the statute interfered with the President's exclusive power to recognize a foreign government.

Zivotofsky's easiest path to victory would be a holding that the place of birth line on a passport falls within Congress's power to regulate passports and has nothing to do with recognizing Israel's sovereignty over Jerusalem. As the Senate brief supporting Zivotofsky puts it, the place of birth line on a passport helps establish a person's identity; it does not legally recognize the sovereignty of a foreign government over a particular territory. The Executive Branch's response is that, no matter what the Court says, the international community will regard upholding Congress's passport law as U.S. recognition of Israel's sovereignty over Jerusalem. It is difficult to predict how the Court will respond to this set of arguments.

Should the Court accept the Executive Branch position that the passport law is an effort to recognize Israel's sovereignty over Jerusalem, the question would then become whether Congress or the President has superior power over recognition. The constitutional text and history provide no clear answer to that question. But it seems likely that the Court will be reluctant to say that Congress has superior power, which would mean that the official United States position is that Israel has sovereignty over Jerusalem. The effect of that decision would be to cause a fundamental shift in U.S. policy on Jerusalem, with unknown foreign policy consequences. At the same time, giving the President the power to override a congressional determination without clear constitutional text and history on its side is not an attractive option either. With no easy choice to make, the Court may end up wishing that it had punted this one on political question grounds.

Yates v. United States (13-7451)

Yates is perhaps the most interesting statutory construction case of the term. *Yates* captured fish that were smaller than the legal limit. When an inspector of the National Marine Fisheries Service issued a citation, *Yates* instructed his crew to dispose of the fish. *Yates* was subsequently charged with destroying evidence of his crime. The statute at issue makes it a crime for anyone to knowingly "destroy" or "conceal" any "record, document, or tangible object" with the intent to impede, obstruct, or influence any federal investigation. *Yates* was convicted, and his conviction was affirmed on the ground that the plain meaning of the term "tangible object" includes a fish.

The government is of course right that the ordinary meaning of tangible object--any object that has a physical form--includes a fish. But at least on a surface level, the destruction of fish does not seem to be what Congress was getting at in this statute. A word's meaning is always informed by the words in proximity, and the terms that precede tangible object--"record" and "document"--don't have anything to do with fish. They instead are aimed at preventing the destruction of information. Because the term tangible object immediately follows "record" and "document," it seems intended to include tangible objects that store information, like computers, not everything that takes a physical form. Moreover, as petitioner points out, the statute was enacted in response to the Enron scandal, which involved the shredding of documents, not the destruction of fish.

As the government sees it, however, the statute was modeled on numerous statutes that are aimed at preventing the destruction of any evidence that is material to an offense. A fish, like any object, is therefore covered when its destruction is intended to cover up an offense. And while the government concedes that the statute was drafted in response to Enron's shredding of

documents, it argues that its purpose extends to any effort to conceal a crime. At bottom, the government argues, it makes no sense to think that Congress intended to prohibit a murderer from concealing his diary, but did not intend to prohibit that same murderer from concealing his murder weapon. Whether that is enough to convince a Court that likely granted certiorari with a view to reversing remains to be seen.

Holt v. Hobbs (13-6827)

Having decided in *Hobby Lobby* last term that the Religious Freedom Restoration Act gives robust protection to persons who object to statutes of general application on religious grounds, the Court returns to the subject of religion under a statute that gives comparable religious protection to inmates, the Religious Land Use and Institutionalized Persons Act (RLUIPA). That statute prohibits a prison institution from imposing a substantial burden on an inmate's religious exercise unless that imposition is the least restrictive means of furthering a compelling governmental interest. The question in this case is whether a prison is required to accommodate an inmate whose religion requires him to grow a beard. Arkansas asserts that its no-beard policy is necessary to ensure that inmates do not hide razor blades or other dangerous objects in their beards, and to prevent escaping inmates from avoiding detection by shaving their beards.

In the context of constitutional claims, the Court gives enormous deference to the judgment of prison officials when it comes to matters of prison security, and Arkansas is asking for a similar degree of deference under RLUIPA. Petitioner argues, however, that by placing the burden on prison institutions to demonstrate that any burden they place on religion is the least restrictive means of furthering a compelling interest, Congress rejected the standard of extreme deference that is applied to constitutional claims. The Court in *Cutter* held that RLUIPA requires "due deference" to the security judgments of prison officials, but that simply begs the question of when deference is "due." Whether the Court will take the opportunity in this case to improve on that formulation is difficult to predict.

Regardless of how the Court articulates the level of deference that is required, the problem for Arkansas is that more than 40 other states and the federal prison system do not prohibit the wearing of beards. Those other prisons either believe that inmates will not use their beards to conceal dangerous items because other hiding places are more attractive, or that beards can be searched for dangerous items, just like other hiding places such as long hair. And they respond to Arkansas's concern about inmates concealing their identities by snapping a photo with and without a beard. To prevail, Arkansas will have to convince the Court that these alternatives are insufficient to further its interest in security.

Young v. United Parcel Service (No. 12-1226)

This case involves the scope of an employer's duty under the Pregnancy Discrimination Act (PDA) to accommodate the physical limitations of employees who are unable to meet job requirements due to pregnancy. United Parcel Service (UPS) offers light duty assignments to employees injured on the job, employees disabled under the Americans with Disabilities Act, and employees who have lost their Department of Transportation certification. It refuses to offer a light duty assignment to pregnant workers unless they fall into one of those three categories. The question for the Court is whether the employer's policy violates the PDA.

In answering that question, the parties focus on different provisions of the PDA. UPS relies on the language in the PDA that defines discrimination because of sex to include discrimination "because of" pregnancy. According to UPS, it does not refuse an accommodation

“because of” an employee’s “pregnancy,” but because an employee, whether pregnant or not, fails to fall within one of the three groups that it offers an accommodation. Thus, if a pregnant worker gets injured on the job, suffers from an ADA disability, or loses her DOT certification, she will receive an accommodation. If she does not fall into one of those categories, however, she, like every other employee who does not fall within one of those three categories, will not receive an accommodation.

Young, by contrast, focuses on the provision in the PDA that provides that women affected by pregnancy shall be treated the same as other persons not so affected but “similar in their ability, or inability, to work.” Because pregnant workers are just as able to perform light duty and just as unable to perform regular work as employees injured on the job, or with an ADA disability, or who have lost DOT certification, Young argues, she must be offered the same light duty accommodation as employees in those categories.

The outcome of this case depends on how the Court reconciles these two provisions. Did Congress intend the ability to work provision to extend protection beyond the prohibition against discrimination because of pregnancy, or did it intend that provision to delineate one important category of discrimination because of pregnancy. If Congress intended the provision to add an extra level of protection, it would be violated whenever, as here, any “other persons” with a similar inability to work are accommodated. On the other hand, if Congress simply intended the provision to delineate one important category of discrimination because of pregnancy, UPS’s pregnancy-blind policy would shield it from liability. How the Court resolves this important question will significantly affect the employment opportunities of pregnant employees.

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Constitutional Law

Commerce Clause

Comptroller of the Treasury of Maryland v. Wynne (No. 13-485)

Question Presented:

Does the United States Constitution prohibit a state from taxing all the income of its residents – wherever earned – by mandating a credit for taxes paid on income earned in other states?

Summary:

Under the Due Process Clause, a state may tax all the income of its residents, wherever earned, and need not credit taxes paid to other states. The issue in this case is whether the dormant Commerce Clause requires a state to provide such a credit.

Maryland imposes a state tax and a county tax on its residents. It deducts taxes paid to other states from the state tax, but not the county tax. Respondents Brian and Karen Wynne, who are residents of Maryland, earned income in several other states. Consistent with state law, Maryland provided an offset for the taxes paid in other states against the state income tax but not the county income tax. Respondents appealed to the Maryland Tax Court, asserting that the failure to provide a setoff against the county tax violated the dormant Commerce Clause. The Tax Court rejected that argument, but the Circuit Court reversed.

The Court of Appeals of Maryland affirmed, holding that Maryland’s failure to provide a setoff for taxes paid to other states violates the dormant Commerce Clause. The court reasoned that Maryland’s tax is not fairly apportioned and discriminates against interstate commerce.

Maryland contends that under controlling Supreme Court precedent, a state may tax the entire income of its residents, regardless of where earned. The constitutional basis for those decisions, petitioner argues, is that state residents enjoy benefits that are not enjoyed by out-of-state residents. That rationale for the state’s authority, petitioner contends, has no less force under the dormant Commerce Clause than it does under the Due Process Clause.

Decision Below:

431 Md. 147 (2013)

Petitioner’s Counsel of Record:

William F. Brockman, Office of the Attorney General of Maryland

Respondents’ Counsel of Record:

Dominic Francis Perella, Hogan Lovells US LLP

First Amendment – Speech

Elonis v. United States (13-983)

Questions Presented:

(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a “reasonable person” would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

(2) Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. § 875(c) requires proof of the defendant's subjective intent to threaten.

Summary:

Federal law makes it a crime to “transmit[] . . . any communication containing . . . any threat to injure the person of another.” 18 U.S.C. § 875(c). The First Amendment does not protect the communication of a “true threat,” but does protect political hyperbole, caustic remarks, or verbal attacks that fall short of a true threat. The Supreme Court held in *Virginia v. Black* that a communication that is made with the intent to threaten is a true threat. The first issue in this case is whether the First Amendment requires proof of a subjective intent to threaten for a communication to constitute a true threat, or whether proof that a reasonable person would regard the statement as a true threat is sufficient. The second question is whether the statute itself requires proof of a subjective intent to threaten.

In 2010, petitioner Anthony Elonis made a series of posts on Facebook that could be viewed as threats to kill his ex-wife, his coworkers, and FBI agents. Petitioner was charged with violating 18 U.S.C. § 875(c). The district court instructed the jury that it should find petitioner guilty if a reasonable speaker would know his statements would be construed as threats, rejecting petitioner’s proposed instruction that the jury must find that he subjectively intended to communicate a threat. The jury found petitioner guilty.

The Third Circuit affirmed. The court held the First Amendment does not require proof of a subjective intent to threaten in order for a communication to constitute a true threat. Instead, the court held, a communication constitutes a true threat when a reasonable person would know that his communication would be regarded as a true threat.

Petitioner contends that *Black* establishes that the First Amendment requires proof of a subjective intent to threaten in order for a communication to constitute a true threat. He further contends that an objective standard would penalize a person for negligently misjudging a listener’s reaction and would create a substantial risk of chilling crude but constitutionally protected speech. At the certiorari stage, the Supreme Court added the question whether the statute itself requires proof of a subjective intent to threaten.

Decision Below:

730 F.3d 321 (3d Cir. 2014)

Petitioner’s Counsel of Record:

John P. Elwood, Vinson & Elkins LLP

Respondent’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

***Reed v. Town of Gilbert, AZ* (13-502)**

Question Presented:

Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners’ religious signs?

Summary:

The Town of Gilbert, Arizona, has a sign code that has size, place, and duration restrictions that differ depending on whether the sign is classified as a political sign, an ideological sign, or a qualifying event sign. The question presented is whether the Town’s sign code is content-based, in violation of the First Amendment.

Petitioners, the Good News Community Church and its pastor Clyde Reed, post signs that

invite members of the community to attend their Sunday services. The Town informed petitioners that their signs are subject to the size, place, and duration limitations that are applicable to signs for qualifying events. Petitioners filed suit in federal district court, alleging that the Town's sign code subjects qualifying event signs to more onerous size, place, and duration limitations than political and ideological signs, and is therefore content-based in violation of the First Amendment. The district court held that the sign code is content-neutral and entered judgments in favor of the Town.

The Ninth Circuit affirmed. The court held that the Town's distinctions between political, ideological, and qualifying event signs are not content-based. The court reasoned that the differences are based on objective factors relevant to the rationale for creating each regulatory category: the rules for political signs respond to the need for communication about elections; the rules for ideological signs recognize an individual's right to express his or her opinion is at the core of the First Amendment; and the rules for qualifying event signs allow the sponsor of an event to put up a sign immediately before the event.

Petitioners contend that the Town's sign code is content-based because it facially classifies on the basis of the subject matter of the signs. Petitioners further argue that the objective justifications for the regulatory distinctions between political, ideological, and qualifying event signs reflect value judgments that the First Amendment forbids the government to make.

Decision Below:

707 F.3d 1057 (9th Cir. 2013)

Petitioners' Counsel of Record:

David A. Cortman, Alliance Defending Freedom

Respondents' Counsel of Record:

Philip W. Savrin, Freeman, Mathis & Gary LLP

Fourteenth Amendment – Equal Protection

Alabama Legislative Black Caucus v. Alabama (13-895)

Alabama Democratic Conference v. Alabama (13-1138)

Questions Presented:

(1) Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.

(2) Whether, as the dissenting judge concluded, this effort amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the non-retrogression aspect of Section 5 of the Voting Rights Act.

(3) Whether these plaintiffs have standing to bring such a constitutional claim.

Summary:

A redistricting plan that is predominantly motivated by race is subject to strict scrutiny, and is unconstitutional unless justified by a compelling interest. Section 5 of the Voting Rights Act prohibits redistricting plans that have the effect of diminishing the ability of blacks to elect their candidates of choice. The question in these consolidated cases is whether Alabama's redistricting plan is predominantly motivated by race, and if so, whether it is justified by Alabama's interest in complying with Section 5.

Following the 2010 census, Alabama adopted new redistricting plans to comply with the

one person, one vote requirement. In a purported attempt to comply with Section 5, the plans intentionally retained the same number of majority black districts as existed previously, and populated those districts with a black population percentage that was at least as high. Appellants, the Alabama Legislative Black Caucus and the Alabama Democratic Conference, sued the State alleging that the redistricting plans constituted racial gerrymandering in violation of the Equal Protection Clause.

A federal district court upheld the constitutionality of the redistricting plans. The court found that the redistricting plans were not predominately motivated by race. It also held that, even if they were, they served the compelling state interest of complying with Section 5.

Appellants argue that Alabama's redistricting plans were predominantly motivated by race. That the state gave greater weight to one person, one vote requirements than to race, appellants argue, has no bearing on the predominant motive inquiry. Appellants further argue that the plans are not justified by Section 5. Reducing black population in majority black districts does not violate Section 5, appellants argue, as long as the remaining population is sufficient to enable blacks to elect the candidates of their choice. In any event, appellants argue, given *Shelby County's* invalidation of the Section 4 coverage formula, Section 5 can no longer furnish a compelling justification for Alabama's continued use of redistricting plans that are predominantly motivated by race.

Decision Below:

2013 WL 6925681 (M.D. Ala., Dec. 20, 2013)

Appellants' Counsel of Record:

Eric Schnapper, University of Washington School of Law (13-895)

Richard H. Pildes, New York University School of Law (13-1138)

Appellee's Counsel of Record:

Andrew L. Brasher, Solicitor General of Alabama

Non-Delegation Doctrine

Department of Transportation v. Association of American Railroads (13-108)

Question Presented:

Whether Section 207 [of the Passenger Rail Investment and Improvement Act of 2008] effects an unconstitutional delegation of legislative power to a private entity.

Summary:

Section 207 of the Passenger Rail Investment and Improvement Act requires the Federal Railroad Administration (FRA) and Amtrak to jointly develop metrics to measure the performance of passenger trains and rail carriers. Amtrak's failure to meet the metrics may trigger an investigation after which damages may be awarded against a host railroad that failed to provide Amtrak a statutory preference. The question presented is whether Congress's delegation of authority to Amtrak to jointly develop performance metrics is an unconstitutional delegation of legislative power.

Pursuant to Section 207, Amtrak and the FRA issued performance metrics that include standards for on-time performance. Respondents, an association of freight railroads, filed suit in federal district court challenging Section 207 as an unconstitutional delegation of legislative authority to a private entity. The district court upheld the constitutionality of Section 207.

The D.C. Circuit reversed. The court held that it is a per se violation of the non-delegation doctrine for Congress to delegate regulatory authority to a private entity. It further

held that Amtrak exercises regulatory authority because the FRA cannot promulgate standards that are opposed by Amtrak, and that Amtrak is a private entity because Congress decreed that it shall operate as a for-profit corporation.

The government argues that Section 207 does not violate the non-delegation doctrine. First, it argues that the FRA retains sufficient control over the performance standards to avoid non-delegation concerns. Second, it argues that the performance standards do not impose any independent obligations on rail carriers other than Amtrak. Finally, it argues that Amtrak is a government agency for purposes of the Constitution.

Decision Below:

721 F.3d 666 (D.C. Cir. 2013)

Petitioner’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent’s Counsel of Record:

Thomas H. Dupree Jr., Gibson, Dunn & Crutcher LLP

Separation of Powers

Zivotofsky v. Kerry (No. 13-628)

Question Presented:

Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in “Israel” on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute “impermissibly infringes on the President’s exercise of the recognition power reposing exclusively in him.”

Summary:

The Executive Branch has long maintained a policy of not recognizing any country’s sovereignty over Jerusalem. Pursuant to that policy, when a person is from Jerusalem, the State Department lists Jerusalem as the place of origin on that person’s passport. Section 214(d) of the Foreign Relations Authorization Act of 2003 requires the State Department to designate Israel as the place of birth on the passport of any US citizen born in Jerusalem who requests the designation. The President has refused to enforce that statutory requirement. At issue in this case is whether Section 214(d) impermissibly interferes with the President’s recognition power.

Petitioner was born in Jerusalem. In accordance with Section 214(d), petitioner’s parents asked the State Department to record Israel as their son’s place of birth on his passport. The State Department denied the request and instead listed Jerusalem as the place of birth. Petitioner filed a complaint in federal district court seeking to require the State Department to record Israel as their son’s place of birth. The D.C. Circuit held that the constitutionality of Section 214(d) is a political question. The Supreme Court reversed the D.C. Circuit’s political question holding, and remanded for that court to determine the merits of the constitutionality of Section 214(d).

On remand, the D.C. Circuit ruled that Section 214(d) is unconstitutional. The court first held that the President exclusively holds the recognition power. The court then held that Section 214(d) impinges on the President’s recognition power because it signals that the United States recognizes Israel’s sovereignty over Jerusalem in conflict with the Executive Branch’s policy to refrain from taking a position on that issue.

Petitioner argues that the President’s recognition power is not exclusive but is instead subject to congressional control. Petitioner further argues that Section 214(d)’s requirement to

list Israel as the place of birth for someone born in Jerusalem falls within Congress’s power to regulate the content of passports.

Decision Below:

725 F.3d 197 (D.C. Cir. 2013)

Petitioner’s Counsel of Record:

Nathan Lewin, Lewin & Lewin, LLP

Respondent’s Counsel of Record:

Donald B. Verrilli, Jr., Solicitor General

Criminal Law

Federal Statutory Offenses

Armed Career Criminal Act

Johnson v. United States (No. 13-7120)

Question Presented:

Whether mere possession of a short-barreled shotgun [is] a violent felony under the Armed Career Criminal Act?

Summary:

The Armed Career Criminal Act (ACCA) provides penalty enhancements when a person has previously committed three “violent felon[ies].” A “violent felony” is defined as any crime that is “burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The issue in this case is whether knowing possession of a short-barreled shotgun is a violent felony.

Petitioner Samuel Johnson pleaded guilty to one count of being a felon in possession of a firearm. Johnson had prior convictions for burglary, attempted burglary, and possession of a short-barreled shotgun. The district court imposed enhanced penalties under the ACCA, rejecting Johnson’s argument that possession of a sawed-off shotgun is not a violent felony.

Relying on its prior decision in *United States v. Lillard*, the Eight Circuit affirmed. In *Lillard*, the court ruled that possession of a short-barreled shotgun is a violent felony. The Court reasoned that possession of a short-barreled shotgun presents a serious risk of physical injury to another that is roughly similar in degree and kind to burglary, arson, extortion, and the use of explosives.

Petitioner contends that possession of a short-barreled shotgun is not a violent felony. Petitioner argues possession of a short-barreled shotgun does not present the same risk as its closest analogue among the enumerated offenses, use of explosives. Petitioner further argues that possession of a short-barreled shotgun does not present comparable risks to any of the other enumerated offenses because, in the ordinary case, the weapon is passively possessed and not exposed to others. For the same reasons, petitioner argues that possession of a short-barreled shotgun is not “purposeful, violent and aggressive” as required by *Begay v. United States*.

Decision Below:

526 Fed. Appx. 708 (8th. Cir. 2013)

Petitioner’s Counsel of Record:

Katherine M. Menendez, Assistant Federal Defender District of Minnesota

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Bank Robbery

Whitfield v. United States (No. 13-9026)

Question Presented:

Whether [the] forced-accompaniment offense [under the federal bank robbery statute, 18 U.S.C. § 2113(e)] requires proof of more than a *de minimis* movement of the victim.

Summary:

A provision of the federal bank robbery statute makes it a separate offense for a person who commits or attempts a bank robbery to force a person to accompany him. The question in this case is whether moving a person from one room to another within the same house constitutes forced accompaniment under that provision.

Petitioner Larry Whitfield attempted to rob a credit union, but when a metal detector went off, he fled to the house of Mary Parnell. While in the house, petitioner ordered Parnell into her computer room with him. Petitioner was later arrested, tried, and convicted of forced accompaniment. The district court rejected petitioner's argument that more than *de minimis* movement is required to constitute forced accompaniment.

The Fourth Circuit affirmed. The court concluded that evidence that petitioner forced his victim to accompany him for a short distance and a brief period was sufficient to establish forced accompaniment.

Petitioner argues that the forced accompaniment statute requires proof of more than a *de minimis* movement. Petitioner relies on the statutory structure, which substantially increases the penalty for bank robbery when it involves forced accompaniment. Because *de minimis* forced movement is common in bank robberies, petitioner argues, unless more than *de minimis* movement is required for forced accompaniment, a person who commits bank robbery would routinely be exposed to the enhanced punishment reserved for the most serious offenders.

Decision Below:

695 F.3d 288 (4th Cir. 2013)

Petitioner's Counsel of Record:

Joshua B. Carpenter, Federal Defenders of Western North Carolina, Inc.

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Sarbanes-Oxley Act

Yates v. United States (13-7451)

Question Presented:

Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, possesses no record-keeping, documentary, or informational content or purpose?

Summary:

The Due Process Clause requires that criminal statutes give fair notice of what they prohibit. A provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, makes it a crime for anyone to "knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in

any record, document, or tangible object with the intent to impede, obstruct, or influence” any federal investigation. The issue in this case is whether section 1519 gives fair notice that destroying or concealing fish with the intent to obstruct an investigation is a crime.

The National Marine Fisheries Service conducted an inspection on petitioner John Yates’s fishing boat and discovered captured fish that were smaller than the legal limit. The inspector issued a citation and ordered petitioner to leave the fish undisturbed until they could be seized after the boat docked. Instead, petitioner instructed his crew to dispose of the fish. Petitioner was charged with destroying or concealing a “tangible object” in violation of 18 U.S.C. § 1519 and was found guilty of that offense.

The Eleventh Circuit affirmed petitioner’s conviction. The court held that the plain meaning of “tangible object” includes fish because the ordinary meaning of “tangible” is “[h]aving or possessing physical form,” and fish have a physical form.

Petitioner argues that the term “tangible object” does not provide fair notice that the destruction of a fish is a violation of section 1519. Petitioner argues that the term “tangible object” should be interpreted to have a similar meaning to its neighboring terms, “records” and “documents.” Petitioner also argues that “tangible object” does not include fish because the title of the provision refers only to the destruction of “records,” and the legislative history shows that the provision was intended as an “anti-shredding” provision.

Decision Below:

733 F.3d 1059 (11th Cir. 2013)

Petitioner’s Counsel of Record:

John L. Badalamenti, Assistant Federal Defender, Tampa, Florida

Respondent’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Fourth Amendment – Search and Seizure

Heien v. North Carolina (No. 13-604)

Question Presented:

Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

Summary:

The Fourth Amendment requires police performing a traffic stop to have at least reasonable suspicion that the driver has violated the traffic laws. At issue in this case is whether an officer’s reasonable, but mistaken, belief about what the law prohibits can provide reasonable suspicion.

Petitioner Nicholas Heien was traveling in his car in North Carolina. The car had one functioning and one malfunctioning brake light. Mistakenly believing that North Carolina law requires a car to have two working brake lights, the police stopped the car. After issuing a citation, police asked for permission to conduct a search. Heien consented, and the police discovered cocaine. After Heien was charged with drug trafficking, he moved to suppress the cocaine as fruit of an unlawful stop. The trial court denied the motion, and Heien pleaded guilty to drug trafficking, reserving the right to appeal the denial of his suppression motion. An intermediate appellate court reversed, holding that police cannot base reasonable suspicion on a mistaken view of the law.

The Supreme Court of North Carolina reversed. The court held that a stop based on a mistake of law does not violate the Fourth Amendment as long as the mistake was reasonable.

The court reasoned that the Fourth Amendment requires that a stop must be objectively reasonable and that when an officer conducts a stop based on a reasonable mistake about what the law prohibits, his conduct is objectively reasonable. Because North Carolina law could reasonably be interpreted as requiring two operating brake lights, rather than one, the court concluded, the officer's stop of petitioner's car was objectively reasonable.

Heien argues that an officer's mistake of law cannot provide reasonable suspicion of wrongdoing. Just as ignorance of the law provides no defense to criminal liability, Heien argues, it cannot justify a police officer's actions. Heien further argues that while an officer is permitted to make reasonable mistakes of fact, that is because officers must often make an on-the-spot assessment of the facts. In contrast, Heien argues, an officer's comprehension of the law should be formed ahead of time.

Decision Below:

737 S.E.2d 351 (N.C. 2013)

Petitioner's Counsel of Record:

Jeffrey L. Fisher, Stanford Law School, Supreme Court Litigation Clinic

Respondent's Counsel of Record:

Robert C. Montgomery, North Carolina Department of Justice

Habeas Corpus – Anti-Terrorism and Effective Death Penalty Act

Jennings v. Stephens (13-7211)

Question Presented:

Did the Fifth Circuit err in holding that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected even though the Fifth Circuit acquired jurisdiction over the entire claim as a result of the respondent's appeal?

Summary:

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), unless a circuit justice or judge issues a certificate of appealability (COA), a habeas petitioner may not take an appeal or cross-appeal from a district court's decision. Outside the context of COAs, the Supreme Court has repeatedly held that an appellee can raise an argument in support of the judgment appealed from without filing a cross-appeal. At issue in this case is whether a federal habeas petitioner who is an appellee can raise an argument in support of the district court's judgment in his favor without first seeking a COA.

In July 1988, Robert Mitchell Jennings was convicted of capital murder for killing a police officer. During the punishment phase, defense counsel failed to introduce any mitigating evidence, and petitioner was sentenced to death. Petitioner filed a federal habeas corpus petition claiming that defense counsel was ineffective in failing to introduce mitigating evidence. He also claimed that counsel was ineffective in making a closing argument suggesting that he could not quarrel with the jury's imposition of the death penalty. The district court ruled for petitioner on counsel's failure to present mitigating evidence, but concluded that counsel's closing statement was not ineffective. The court ordered a new sentencing hearing.

The court of appeals reversed, holding that counsel was not constitutionally ineffective in failing to introduce mitigating evidence. While petitioner offered the ineffectiveness of counsel's closing argument as an alternative ground for affirmance, the court held that it lacked jurisdiction to consider that argument. The court concluded that a COA is a prerequisite to

consideration of alternative grounds for affirmance, and petitioner failed to obtain such a certificate.

Petitioner contends that a federal habeas petitioner can raise an alternative ground for affirmance without obtaining a COA because it is well established that an appellee can urge affirmance on alternative grounds without taking an appeal. The COA requirement does not alter that established rule, petitioner argues, because the COA requirement governs only when a habeas petitioner may take an appeal, not what arguments a habeas petitioner can make when the State has taken an appeal. Even if a COA were required to raise a different claim, petitioner argues, he merely offered another argument related to the ineffective assistance claim on which he obtained a COA. Finally, petitioner contends that, even if a COA were required to consider his argument on counsel's closing argument, the court of appeals should have either issued one or remanded to the district court for consideration of whether one should be issued.

Decision Below:

537 Fed. Appx. 326 (5th Cir. 2013)

Petitioner's Counsel of Record:

Randolph L. Schaffer Jr., The Schaffer Firm

Respondent's Counsel of Record:

Andrew S. Oldham, Office of the Texas Attorney General

Federal Practice and Procedure

Appellate Procedure – Final Judgment Rule

Gelboim v. Bank of America Corporation, 13-1174

Question Presented:

Whether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable?

Summary:

Under 29 U.S.C. § 1291, a party may immediately appeal a final decision of a district court. Fed. R. Civ. P. 54(b) allows an immediate appeal when the district court directs entry of a final judgment as to one or more, but fewer than all, claims or parties, and certifies that there is no just reason for delay. The question in this case is whether a district court's dismissal of one action that has been consolidated with other actions is immediately appealable as a final decision under Section 1291, or whether such a dismissal is appealable only when the district court directs entry of final judgment under Rule 54(b).

Respondents (Credit Suisse and other financial institutions) allegedly manipulated short-term interest rates through the submission of false information, resulting in the suppression of the dollar. Multiple suits followed, claiming injuries from respondents' actions. The Judicial Panel on Multidistrict litigation consolidated the cases for pretrial proceedings in the Southern District of New York. The district court dismissed all antitrust claims, but denied the motion to dismiss claims under the Commodity Exchange Act. Because petitioners Gelboim and Zacher had raised only antitrust claims, the district court's action resulted in the dismissal of their suit in its entirety.

Petitioners appealed under Section 1291, but the Second Circuit dismissed for lack of jurisdiction. The court of appeals held that the district court had not issued a final decision because it had not disposed of all of the claims in the consolidated action.

Petitioners argue the dismissal of their action was immediately appealable under Section 1291. Because consolidation does not merge separately filed actions into a single case, petitioners argue, the dismissal of their action constituted a final decision within the meaning of Section 1291. Petitioners further argue that that Rule 54(b) is inapplicable because it applies only when a subset of claims or parties to an action are dismissed, not when an action is dismissed in its entirety.

Decision Below:

13-3565 Order (2d Cir. 2013)

Petitioners' Counsel of Record:

Thomas. C. Goldstein, Goldstein & Russell, P.C.

Respondents' Counsel of Record:

Jeffrey B. Wall, Sullivan & Cromwell LLP

Class Actions

Dart Cherokee Basin Operating Co. v. Owens (No. 13-719)

Question Presented:

Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or is alleging the required “short and plain statement of the grounds for removal” enough?

Summary:

The Class Action Fairness Act of 2005 (CAFA) permits a defendant in a class action to remove the action to federal court if certain criteria are met. One requirement is that the amount in controversy must exceed \$5 million. Under the general removal provision, a defendant must file a notice of removal containing “a short and plain statement of the grounds for removal.” Where the complaint does not demand a specific amount, the notice of removal may assert the amount in controversy, and removal is proper if the district court finds, by a preponderance of the evidence, that the amount in controversy exceeds the applicable jurisdictional threshold. The question in this case is whether the notice of removal must include *evidence* that the amount in controversy exceeds the applicable jurisdictional threshold.

Respondent Brandon Owens filed a class action petition in Kansas state court on behalf of a class of royalty owners, alleging that petitioner Dart Cherokee Basin Operating Company had underpaid royalties on certain gas wells. The complaint did not seek a specific sum of money. Petitioner filed a notice of removal in federal district court, asserting that the amount in controversy exceeded \$8.2 million. Without disputing that allegation, respondent moved to remand on the ground that petitioner’s notice of removal did not contain evidence that the amount in controversy exceeded \$5 million. In response, petitioner submitted evidence to support its allegation. The district court remanded the case to state court.

The district court read Tenth Circuit precedent to require a defendant seeking removal to submit evidence in the notice of removal that the amount in controversy exceeds the applicable jurisdictional threshold. The district court further held that, under Tenth Circuit precedent, petitioner’s evidence in response to the motion to remand came too late. The Tenth Circuit denied permission to appeal without explanation, and en banc review was denied by an equally divided court.

Petitioner contends that the plain language of the removal provision requires that a notice of removal *allege* that the amount in controversy exceeds the applicable jurisdictional threshold. Petitioner argues that under the Supreme Court’s decision in *Hertz Corp. v. Friend*, a party is

required to submit evidence to support its jurisdictional allegations only when an opposing party disputes the allegation.

Decision Below:

730 F.3d 1234 (10th Cir. 2013)

Petitioners' Counsel of Record:

Nowell D. Berreth, Alston & Bird LLP

Respondent's Counsel of Record:

Rex A. Sharp, Gunderson Sharp, LLP

Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc. (No. 13-640)

Question Presented:

Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in § 13 of the Securities Act with respect to the claims of putative class members?

Summary:

The Securities Act provides that no suit may be “brought” more than three years after the sale of a security. In *American Pipe & Construction Co. v. Utah*, the Supreme Court held that the commencement of a putative class action suspends the statute of limitations for all putative class members. The question presented is whether the *American Pipe* rule applies to the three-year statute of repose in the Securities Act.

Petitioner, the Public Employees' Retirement System of Mississippi, purchased securities from respondents, IndyMac MBS and related entities. A different purchaser filed a putative class action on behalf of petitioner and other class members, within the three-year statutory period, alleging that respondents made materially false and misleading statements in connection with the sale of those securities. After the district court dismissed the plaintiff's claims involving those securities for lack of standing, and after the three-year period for filing suit elapsed, petitioner moved to intervene. The district court denied the motion to intervene on the ground that petitioner failed to file its claim within the three-year period.

The Second Circuit affirmed, holding that the *American Pipe* rule does not apply to the Security Act's three-year statute of repose. The court first concluded that if the *American Pipe* rule is based on equitable tolling, its application is barred by the Supreme Court's decision in *Lampf*, which held that the three-year statute of repose is not subject to equitable tolling. Alternatively, the court held that if the *American Pipe* rule is based on the class action procedures in Fed. R. Civ. P. 23, applying it to the three-year statute of repose would violate the prohibition in the Rules Enabling Act against abridging a “substantive right.”

Petitioner contends that the *American Pipe* rule applies to the three-year period in the Securities Act and that the timely filing of a class action complaint therefore satisfies the three-year period for all putative class members. Petitioner first argues that the *American Pipe* rule is not an equitable tolling rule, but instead rests on a holding that, under Rule 23, the filing of a class action commences the action for all putative class members. Petitioner further argues that the three year-period in the Securities Act does not create a substantive right, but simply cuts off relief. Finally, petitioner argues that even if the three-year period creates a substantive right, applying the *American Pipe* would not violate that right because that rule merely defines when a putative class member has “brought” suit within the meaning of the three-year period.

Decision Below:

721 F.3d 95 (2d Cir. 2013)

Petitioner’s Counsel of Record:

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

Respondents’ Counsel of Record:

Scott H. Christensen, Hughes Hubbard & Reed LLP

Patrick Thomas Egan, Berman DeValerio

Theodore B. Olson, Gibson, Dunn & Crutcher LLP

Robin F. Zwerling, Zwerling, Schaschter & Zwerling, LLP

Equitable Tolling

United States v. June (No. 13-1075)

Question Presented:

Whether the two-year time limit for filing an administrative claim with the appropriate federal agency under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

Summary:

The Federal Torts Claim Act (FTCA) waives the immunity of the United States for damage claims arising out of torts committed by federal employees. Before filing suit in court, a party must first file a claim with the relevant federal agency within “two years after such claim accrues” or it “shall be forever barred.” The question presented is whether the two-year deadline is subject to equitable tolling.

In 2005, Edward Booth died in a highway accident. In 2010, respondent June, the conservator for Booth’s son, filed a claim under the FTCA with the Federal Highway Administration (FHA). The FHA denied the claim as untimely. Respondent subsequently filed a suit in federal court under the FTCA, alleging that the United States was negligent in enforcing its policies on highway safety barriers. The district court dismissed the action, rejecting respondent’s contention that the two-year deadline is subject to equitable tolling.

The Ninth Circuit reversed. Relying on its en banc decision in *Wong* (discussed above), the Ninth Circuit held that the two-year filing deadline is not jurisdictional and is subject to equitable tolling.

The government argues that the two-year deadline is not subject to equitable tolling. The government first contends that the terms “shall be forever barred” establish a jurisdictional limitation, foreclosing equitable tolling. That language, the government argues, was patterned on the Tucker Act, and the Court has repeatedly interpreted the Tucker Act to establish a jurisdictional limitation that is not subject to equitable tolling. The government alternatively contends that even if the two-year limit is not jurisdictional, it is a mandatory rule that is not subject to equitable tolling. The ordinary presumption in favor of equitable tolling of non-jurisdictional limits, the government argues, is inapplicable to claims that must first be presented to a federal agency, and any presumption in favor of equitable tolling is rebutted by the use of the terms “shall be forever barred.”

Decision Below:

500 Fed. Appx. 505 (9th Cir. 2013)

Petitioner’s Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent’s Counsel of Record:

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

United States v. Wong (No. 13-1074)**Question Presented:**

Whether the six-month time bar for filing suit in federal court under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

Summary:

The Federal Torts Claim Act (FTCA) waives the immunity of the United States for damage claims arising out of torts committed by federal employees. Before filing suit in court, a party must first file a claim with the relevant federal agency. If the federal agency denies the claim, an action may be brought in federal district court, but if the claim is not brought within six months of the mailing of notice of the agency's denial, it "shall be forever barred." The question presented is whether the six-month deadline is subject to equitable tolling.

Respondent Wong was held in immigration detention for five days, and was subsequently removed from the country. Wong presented a claim to the Immigration and Naturalization Service (INS) under the FTCA, alleging negligence in the conditions of her confinement. She also filed a *Bivens* suit in federal district court against individual government officials. After the INS denied her FTCA claim, respondent amended her complaint to add an FTCA claim, but that amendment was not filed within the six-month period. The district court dismissed the FTCA claim for lack of jurisdiction.

The en banc Ninth Circuit reversed. The court first held that the six-month deadline is not jurisdictional because Congress did not clearly express its intent to make it jurisdictional. Applying the presumption in favor of equitable tolling of non-jurisdictional rules, the court then held that the six-month period is subject to equitable tolling.

The government argues that the six-month deadline is not subject to equitable tolling. The government first contends that the terms "shall be forever barred" establish a jurisdictional limitation, foreclosing equitable tolling. That language, the government argues, was patterned on the Tucker Act, and the Court has repeatedly interpreted the Tucker Act to establish a jurisdictional limitation that is not subject to equitable tolling. The government alternatively contends that even if the two-year limit is not jurisdictional, it is a mandatory rule that is not subject to equitable tolling. Any presumption in favor of equitable tolling, the government argues, is rebutted by the use of the terms "shall be forever barred."

Decision Below:

732 F.3d 1030 (9th Cir. 2013) (en banc)

Petitioner's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent's Counsel of Record:

Eric Schnapper, University of Washington School of Law

Evidence***Warger v. Shauers*** (13-517)**Question Presented:**

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

Summary:

Fed. R. Evid. 606(b) provides that "during an inquiry into the validity of a verdict," a juror is generally precluded from testifying about jury deliberations. Rule 606(b) permits such

testimony, however, when it relates to “extraneous prejudicial information.” At issue here is whether Rule 606(b) permits a party seeking a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

Petitioner Gregory Warger was seriously injured in a traffic accident with respondent Randy Shauers. Petitioner sued to recover for his injuries in federal district court. During voir dire, the foreperson said there was no reason she could not remain fair and impartial, and that she could vote to award damages if the evidence supported such an award. Following a jury verdict for respondent, petitioner moved for a new trial, alleging that the foreperson had been dishonest during voir dire. In support of that allegation, petitioner presented a juror’s affidavit alleging that, during deliberations, the foreperson said her daughter had been at fault in a fatal car accident, and that her daughter’s life would have been ruined had she been sued. The district court refused to consider the juror’s affidavit and denied petitioner’s motion for a new trial.

The Eighth Circuit affirmed. The court held that Rule 606(b) precluded the juror’s testimony about the foreperson’s alleged dishonesty. It concluded that because petitioner was seeking a new trial, he was necessarily asking for “an inquiry into the validity of the verdict.” The court further concluded that a juror’s personal experience is not “extraneous information” excepted from Rule 606(b)’s general prohibition.

Petitioner contends that Rule 606(b) permits an inquiry into a juror’s bias during voir dire. Petitioner first contends that such an inquiry does not constitute an inquiry “into the validity of the verdict,” making Rule 606(b) inapplicable. Petitioner alternatively contends that a juror’s personal experience constitutes “extraneous prejudicial information” that falls within the exception to Rule 606(b)’s general prohibition.

Decision Below:

721 F.3d 606 (8th Cir. 2013)

Petitioner’s Counsel of Record:

Kannon K. Shanmugam, Williams & Connolly LLP

Respondent’s Counsel of Record:

Ronald R. Kappelman, Banks, Johnson, Kappelman & Becker, PLLC

Intellectual Property

Patent

Teva Pharmaceuticals USA, Inc., v. Sandoz, Inc. (13-854)

Question Presented:

Whether a district court’s factual finding in support of its construction of a patent claim term may be reviewed de novo, as the Federal Circuit requires (and as the panel explicitly did in this case), or only for clear error, as Rule 52(a) requires.

Summary:

Fed. R. Civ. P. 52(a) requires courts of appeals to defer to district courts’ findings of fact unless they are “clearly erroneous.” The Federal Circuit, however, considers the construction of patent claims a matter of law, and therefore reviews them de novo. The question in this case is whether a finding concerning how a person skilled in the art would understand a patent claim is subject to clear error or de novo review.

Petitioner Teva Pharmaceuticals owns patents related to the drug Copaxone®, which is used to treat multiple sclerosis. When respondents, who are also pharmaceutical companies,

sought FDA approval to produce generic versions of this drug, petitioner sued for patent infringement. In defense, respondents alleged that the patent claims are invalid because they are not sufficiently definite. After hearing expert testimony on how a person skilled in the art would understand the claim, the district court found that the claims are sufficiently definite and therefore valid.

The Federal Circuit reversed in pertinent part, holding that the claims are indefinite and therefore invalid. The Court reviewed the claims de novo, holding that indefiniteness is a question of law. The court based that holding on its en banc decision in *Cybor Corp. v. FAS Techs.* In that case, the court reasoned that, because the construction of patent claims is based on the patent documents themselves, de novo review is appropriate.

Petitioner argues that Rule 52(a) applies to all factual findings in a bench trial, including factual issues that bear on the construction of patents. In particular, petitioner argues that the question of how person of ordinary skill in the relevant art would understand the claim is an issue of fact, subject to clear error review under Rule 52.

Decision Below:

723 F.3d 1363 (Fed. Cir. 2013)

Petitioners' Counsel of Record:

William M. Jay, Goodwin Procter LLP

Respondents' Counsel of Record:

Deanne E. Maynard, Morrison & Foerster LLP

Carter G. Phillips, Sidley Austin LLP

Trademark

***B&B Hardware v. Hargis Industries* (13-352)**

Questions Presented:

(1) Whether the [Trademark Trial and Appeal Board's (TTAB's)] finding of a likelihood of confusion precludes Hargis from relitigating that issue in infringement litigation, in which likelihood of confusion is an element.

(2) Whether, if issue preclusion does not apply, the district court was obliged to defer to the TTAB's finding of a likelihood of confusion absent strong evidence to rebut it.

Summary:

Under the Lanham Act, if a person seeks to register a mark, the owner of an existing registered mark may file an opposition proceeding with the Trademark Trial and Appeal Board (TTAB), based on the likelihood of confusion between the marks. Under the same Act, the owner of a registered mark may also file an action for infringement in federal district court based on the likelihood of confusion. The question in this case is whether the TTAB's finding of a likelihood of confusion has preclusive effect in an infringement action, and if not, whether the district court should defer to that finding absent strong evidence to the contrary.

Petitioner B&B Hardware owns the registered trademark SEALTIGHT for its sealing fasteners. When respondent Hargis sought to register the mark SEALTITE for its self-drilling and self-taping screws, petitioner filed an opposition proceeding before the TTAB and an infringement action in federal district court. In the opposition proceeding, the TTAB found a likelihood of confusion between the marks, and denied registration of respondent's mark. In the infringement action, the district court refused to give preclusive effect to the TTAB's finding. A jury subsequently found no likelihood of confusion, and ruled in respondent's favor.

The Eighth Circuit affirmed, holding that a TTAB finding of likelihood of confusion is

not entitled to preclusive effect in an infringement action. The court reasoned that the likelihood of confusion issue is different in the two contexts because the TTAB applies different factors than those required by the Eight Circuit. The court emphasized that the TTAB gave too much weight to the sight and sound of the marks and not enough to the differences in the products and the markets in which they are sold.

Petitioner contends that the TTAB's finding of a likelihood of confusion is entitled to preclusive effect in an infringement action because it is the same legal issue under the Lanham Act whether it arises in a TTAB proceeding or in an infringement action. That courts may apply different factors in deciding the issue than the TTAB, petitioner argues, does not justify a failure to apply ordinary preclusion rules.

Decision Below:

716 F.3d 1020 (8th Cir. 2013)

Petitioner's Counsel of Record:

William M. Jay, Goodwin Procter LLP

Respondents' Counsel of Record:

Neal Kumar Katyal, Hogan Lovells US LLP

Hana Financial, Inc. v. Hana Bank (No. 13- 1211)

Question Presented:

Whether the jury or the court determines whether use of an older mark may be tacked to a newer one.

Summary:

The owner of a trademark must have priority. An entity has priority when it is the first to use the mark in selling goods or services. The tacking doctrine allows a trademark user to tack its older mark to a new mark for purposes of determining priority when the marks create the same commercial impression. The question presented in this case is whether tacking is a factual issue for the jury to decide or a legal issue for the court to determine.

Petitioner began using its trademark Hana Financial in 1995 and registered that trademark in 1996. Respondent began using Hana Overseas Korean Club in 1994; it changed its name to Hana World Center in 2000; and it began operations under the name of Hana Bank in 2002. When petitioner sued respondent for trademark infringement, respondent defended on the ground that it could tack its 1994 use of Hana Overseas Korean Club, through its 2000 use of Hana World Center, to its current use of Hana Bank. That issue was submitted to the jury, which found for respondent.

The Ninth Circuit affirmed. The court held that tacking is a question of fact for the jury to decide, subject to review for sufficiency of the evidence. Concluding that the jury could reasonably find that Hana Overseas Korean Club, Hana World Center, and Hana Bank all create the same commercial impression, the court sustained the jury's finding.

Petitioner argues that because tacking falls between a pure question of law and a pure question of fact, its treatment depends on considerations of sound judicial administration. Those considerations require its treatment as a question of law, petitioner argues, in order to serve the trademark law's interests in predictability and uniformity.

Decision Below:

735 F.3d 1158 (9th Cir. 2013)

Petitioner's Counsel of Record:

Charles A. Rothfeld, Mayer Brown LLP

Respondent's Counsel of Record:

Carlo Frank Van den Bosch, Sheppard Mullin Richter & Hampton

Labor and Employment**Employment*****Department of Homeland Security v. MacLean*** (13-894)**Question Presented:**

Whether certain statutory protections codified at 5 U.S.C. § 2302(b)(8)(A) [of the Whistleblower Protection Act], which are inapplicable when an employee makes a disclosure “specifically prohibited by law,” can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information.

Summary:

Under the Whistleblower Protection Act (WPA), the government may not take a personnel action against an employee for disclosing information that reveals a substantial threat to public health or safety. That prohibition does not apply, however, when the disclosure is “specifically prohibited by law.” The Aviation and Transportation Security Act (ATSA) directs the Transportation and Security Agency (TSA) to adopt regulations that prohibit disclosure of information that would be “detrimental to the security of transportation.” Pursuant to that mandate, the TSA issued regulations that prohibit disclosure of Sensitive Security Information (SSI), a category that includes information related to the deployment of Federal Air Marshals. At issue here is whether the disclosure of SSI is “specifically prohibited by law” within the meaning of the WPA.

Respondent MacLean was a Federal Marshal with the TSA. In 2003, the TSA told respondent that Federal Marshals would not be stationed on overnight flights to Las Vegas for the next month. MacLean released that information to the news media after his internal complaint did not result in a change of policy. The TSA removed respondent from his position for disclosing SSI. Respondent appealed to the Merit Systems Protection Board (MSPB), alleging that his removal violated the WPA. The MSPB rejected his claim.

The Federal Circuit vacated the MSPB’s decision and remanded for further proceedings. The court held that the exception to the WPA for disclosures “specifically prohibited by law” encompasses only statutory prohibitions, not regulatory prohibitions. The court further held that while the regulations issued pursuant to the ATSA specifically prohibit the disclosure of SSI, the ATSA itself does not. The court reasoned that the ATSA’s general directive to issue regulations prohibiting disclosures “detrimental to the security of transportation” leaves the agency with too much discretion to conclude that the statute specifically prohibits what the TSA’s regulations prohibit.

The government contends that the term “law” in the phrase “specifically prohibited by law” includes not only statutes, but also regulations, at least when the regulations are issued pursuant to an express statutory mandate. Because the release of SSI is specifically prohibited by congressionally mandated regulations, the government argues, it is specifically prohibited by law. The government alternatively contends that even if the term “law” encompasses only statutes, disclosure of SSI is specifically prohibited by the ATSA. In the government’s view, it is irrelevant that the TSA has some discretion to decide what disclosures are “detrimental to the security of transportation.” What is critical, the government argues, is that the ATSA itself directs the TSA to issue regulations covering that specific category of information.

Decision below:

714 F.3d 1301 (Fed. Cir. 2013)

Petitioner Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Respondent Counsel of Record:

Neal K. Katyal, Hogan Lovells US LLP

Mach Mining v. Equal Employment Opportunity Commission* (13-1019)*Question Presented:**

Whether and to what extent may a court enforce the [Equal Employment Opportunity Commission's (EEOC's)] mandatory duty to conciliate discrimination claims before filing suit?

Summary:

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. Under Title VII, a complainant files a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), which "shall endeavor" to seek informal resolution of the complaint. If conciliation efforts fail, the EEOC may then sue an employer in federal district court. At issue in this case is whether a court may dismiss an action filed by the EEOC on the ground that it has not adequately fulfilled its duty to conciliate.

A complainant filed with the EEOC a charge of sex discrimination against petitioner Mach Mining. After determining that conciliation efforts had failed, the EEOC sued petitioner in federal district court. Mach Mining asserted as an affirmative defense that the EEOC had not conciliated in good faith before filing suit. The district court rejected the EEOC's contention that a failure to conciliate is not an affirmative defense, but authorized an immediate appeal of that issue.

The Seventh Circuit reversed, holding that a failure to conciliate is not an affirmative defense to a charge of discrimination. The Seventh Circuit reasoned that Title VII does not expressly provide such an affirmative defense, the statute confers on the EEOC discretion to decide when conciliation has failed, the duty to keep conciliation efforts confidential leaves courts without evidence to decide the issue, there is no workable standard for deciding the adequacy of conciliation efforts, and recognizing such a defense would give employers an incentive to undermine the conciliation process.

Petitioner contends that failure to conciliate is an affirmative defense to an EEOC suit under Title VII. Petitioner relies on a background rule that a plaintiff's noncompliance with a mandatory precondition to suit requires dismissal of the suit. Petitioner further argues that while Title VII confers on the EEOC discretion to decide whether the employer's offer is substantively sufficient, it does not preclude judicial review of the procedural adequacy of the EEOC's conciliation efforts. Petitioner also argues that the requirement of confidentiality applies only to use as proof (or disproof) of discrimination. It argues that experience demonstrates that a good faith standard is workable. And it argues that enforcing a good faith conciliation requirement will promote the conciliation process, not undermine it.

Decision Below:738 F.3d 171 (7th Cir. 2013)**Petitioner's Counsel of Record:**

Thomas C. Goldstein, Goldstein & Russell, P.C.

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Young v. United Parcel Service (No. 12-1226)**Question Presented:**

Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are “similar in their ability or inability to work.”

Summary:

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of sex. The Pregnancy Discrimination Act (PDA) defines discrimination because of sex to include discrimination because of pregnancy, and further provides that pregnant employees shall be treated the same for all employment-related purposes as other persons “similar in their ability or inability to work.” The question presented in this case is whether the PDA requires employers to accommodate pregnant workers limited in their ability to work when it accommodates some, but not all, nonpregnant workers similarly limited in their ability to work.

Petitioner Peggy Young worked for respondent United Parcel Service driving a delivery truck. When petitioner became pregnant, she provided notice from her physician that she could not lift more than 20 pounds. Respondent’s employment policy generally required workers to lift 70 pounds, but it offered light-duty assignments to employees injured on the job, employees disabled under the Americans with Disabilities Act, and employees who lost their Department of Transportation certification. Because petitioner did not fall into one of those categories, respondent refused to provide her with a light-duty assignment and placed her on unpaid leave. Petitioner sued respondent in federal district court, claiming that respondent’s failure to offer her a light-duty assignment violated the PDA. The district court ruled in respondent’s favor.

The Fourth Circuit affirmed, holding that respondent’s failure to offer light-duty work to pregnant workers did not constitute discrimination because of pregnancy. The court first held respondent’s policy did not facially discriminate because of pregnancy because each of the categories of employees offered light-duty work was pregnancy-blind. The court also held that pregnant workers were not similar in their ability to work to the employees in the three categories. The court explained that pregnant employees are dissimilar from employees disabled within the meaning of the ADA because their disability is temporary, they are dissimilar from employees without a DOT certification because there is no legal barrier to their working, and they are dissimilar from employees injured on the job because their inability to work does not arise from a work-related injury.

Petitioner argues that because respondent would have offered light-duty work to employees in three categories if they had a 20-pound lifting restriction, and petitioner was similar in her ability to work to those employees, the PDA unambiguously required respondent to offer her the same accommodation. It makes no difference under the statute that she was different from the employees eligible for an accommodation in other ways, petitioner argues, since the only thing that matters under the statute is that she was similar in her ability to work.

Decision Below:

707 F.3d 437 (4th Cir. 2013)

Petitioner’s Counsel of Record:

Samuel R. Bagenstos, University of Michigan Clinical Law Program

Respondent’s Counsel of Record:

Mark A. Perry, Gibson, Dunn, & Crutcher LLP

Labor

***Integrity Staffing Solutions, Inc. v. Busk* (13-433)**

Question Presented:

Whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act.

Summary:

The Fair Labor Standards Act (FLSA) generally requires an employer to pay a minimum wage for time spent working on the job. The Portal-to-Portal Act exempts from that requirement time spent on activities that are “preliminary” or “postliminary” to the “principal activity or activities” for which a worker is employed. In *Steiner v. Mitchell*, the Supreme Court held that any activity that is “integral and indispensable” to an employee’s principal activities is itself a principal activity and therefore compensable. The question presented in this case is whether security screenings to prevent employee theft are integral and indispensable to an employee’s principal job activities.

Petitioner Integrity Staffing Solutions employed respondents Jesse Busk and Laurie Castro to work at a warehouse filling orders placed on Amazon.com. Before leaving at the end of their shift, petitioner required respondents to pass through a security screening. Petitioner conducted the screenings to prevent employee theft. Petitioner did not compensate respondents for the time spent in the screening process. Respondents sued petitioner for violations of the FLSA. The district court dismissed the complaint, holding that time spent in security screenings is excluded from compensation under the Portal-to-Portal Act.

The Ninth Circuit reversed. The court held that an activity is “integral and indispensable” and therefore compensable when it is (1) necessary to the work performed and (2) done for the benefit of the employer. Those two prerequisites were satisfied, the court concluded, because petitioner conducted the screenings to prevent theft, a concern that arose from respondents’ access to merchandise as warehouse workers.

Petitioner argues that the security screenings were not integral and indispensable to respondents’ principal activity of filling customer orders because they occurred after respondents’ completed that activity and were off the floor. Petitioner further argues that it is irrelevant that the need for security clearances arose from respondents’ access to materials because respondents’ principal activity involving filling orders not access to materials.

Decision Below:

713 F.3d 525 (9th Cir. 2013)

Petitioner’s Counsel of Record:

Paul D. Clement, Bancroft PLLC

Respondents’ Counsel of Record:

Mark R. Thierman, Thierman Law Firm

***M&G Polymers USA v. Tackett* (13-1010)**

Question Presented:

Whether, when construing collective bargaining agreements in Labor Management Relations Act (LMRA) cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as

the Third Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold.

Summary:

Collective bargain agreements (CBAs) that provide benefits to employees often do not expressly address the duration of the benefits. In particular, they do not expressly address whether the benefits vest at retirement and therefore continue even after the agreement expires or whether they are unvested and are therefore subject to the terms of later agreements. The issue in this case is whether in the absence of language expressly addressing the duration of benefits, there is a presumption in favor of vesting, against vesting, or no presumption at all.

When respondent Tackett retired in 1996, the CBA governing his benefits provided retirees with healthcare benefits “with full Company contribution.” In 2005, M&G Polymers and Tackett’s union agreed to a new CBA that capped employer contributions. Pursuant to that agreement, M&G Polymers sought contribution from Tackett. Tackett filed suit seeking full contribution from M&G. The district court ruled in Tackett’s favor.

The Sixth Circuit affirmed. The Sixth Circuit held that the language in the agreement providing employees with healthcare benefits “with full Company contribution,” together with the language in the CBA linking healthcare benefits to pension benefits, showed an intent to vest lifetime, contribution-free benefits.

Petitioner contends that the Sixth Circuit improperly relied on a presumption that, in the absence of express language in a CBA to the contrary, benefits vest upon retirement. Other circuits, petitioner contends, either require express language showing an intent to vest, or at least require some language in the agreement that can be construed to provide lifetime benefits.

Decision Below:

733 F.3d 589 (6th Cir. 2013)

Petitioners’ Counsel of Record:

Allyson N. Ho, Morgan, Lewis & Bockius LLP

Respondents’ Counsel of Record:

David M. Cook, Cook & Logothetis LLC

Miscellaneous Business

Antitrust

North Carolina State Board of Dental Examiners v. Federal Trade Commission (13-534)

Question Presented:

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a “private” actor simply because, pursuant to state law, a majority of the board’s members are also market participants who are elected to their official positions by other market participants.

Summary:

The federal antitrust laws do not apply to restraints on trade imposed by states. Private parties can share in that state action antitrust exemption if: (1) their actions are authorized by a clearly articulated state policy and (2) their conduct is “actively supervised by the State itself.” The active supervision requirement does not apply to municipalities, and the Court has indicated it likely does not apply to state agencies either. The question presented is whether the “active supervision” requirement applies to a state agency when a majority of its members are market

participants elected by other market participants.

Petitioner, the North Carolina State Board of Dental Examiners, is a state agency responsible for licensing and regulating the professional conduct of dentists in North Carolina. State law requires six of the Board's eight members to be licensed dentists elected by other licensed dentists. The Board issued cease-and-desist letters to non-dentists who were performing teeth-whitening services. The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's cease-and-desist orders constituted anticompetitive conduct in violation of Section 5 of the FTC Act. The FTC issued an order enjoining the Board from issuing extra-judicial orders to teeth-whitening providers in North Carolina.

The Fourth Circuit denied the Board's petition for review of the FTC order. The court held that when a state agency is composed of private market participants elected by other private participants, it must be treated as a private actor for purposes of the antitrust laws and therefore must demonstrate active supervision by the state in order to qualify for the state action exemption. Because the Board issued the cease-and-desist orders without active state supervision, the court held, the state action antitrust exemption does not apply.

Petitioner argues there is no active supervision requirement for state agencies, and that neither the inclusion of market participants nor the method of their selection makes a state agency a private actor. Petitioner also contends that requiring the states to actively supervise state agencies composed of private market participants in order to shield their actions from the antitrust laws would violate fundamental principles of federalism by intruding on states' sovereign decisions concerning how to structure their regulatory schemes.

Decision Below:

717 F.3d 359 (4th Cir. 2013)

Petitioner's Counsel of Record:

Glen D. Nager, Jones Day

Respondent's Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Banking

Jesinoski v. Countrywide Home Loans, Inc. (13-684)

Question Presented:

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 [of the Truth in Lending Act] by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held.

Summary:

The Truth in Lending Act (TILA), gives a borrower the right to rescind a loan "by notifying the creditor . . . of his intention to do so" within three days of receiving the required notifications and information. Even without receiving the proper disclosures, the right to rescind expires three years after the transaction. "Regulation Z," an implementing regulation reissued by the Consumer Financial Protection Bureau, specifies that a borrower must provide written notification in order to exercise his or her right to rescind. At issue in this case is whether sending written notification within the three-year period is sufficient to exercise the borrower's right to rescind or whether the borrowers must instead file suit within the three-year period.

Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence with

respondent Countrywide for \$611,000. Within three year of receiving the loan, the Jesinoskis sent written notice of their intent to rescind, asserting that Countrywide failed to provide all the proper forms. Respondent Bank of America Home Loans denied the claim and did not take the necessary steps under TILA to terminate the loan. One year later, the Jesinoskis filed suit in the federal district court seeking to enforce the rescission. The district court ruled that the suit was untimely because the suit had been filed more than three years after consummation of the transaction.

In reliance on its earlier decision in *Keiran v. Home Capital, Inc.*, the Eighth Circuit affirmed. In *Keiran*, the Eighth Circuit held that a borrower exercises his right to rescission only if he files suit within three years of the transaction. In reaching that conclusion, the court relied on the nature of a statute of repose as a complete bar to a cause of action, the equitable nature of the remedy of rescission, and a concern that a cloud on the lender's title would ensue absent a date certain for filing suit.

Petitioners contend that the right to rescind is exercised by written notification within the three-year period. Petitioners argue that the plain language of TILA specifies that that the right to rescission may be exercised “by notifying the creditor,” that the provision setting a three-year outer window for rescission does not address how the right shall be exercised, and that neither provision sets a deadline for filing suit. Petitioner also argues that Regulation Z removes any doubt in favor of the sufficiency of written notice.

Decision Below:

729 F.3d 1092 (8th Cir. 2013)

Petitioners' Counsel of Record:

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans, & Figel, P.L.L.C.

Respondents' Counsel of Record:

Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

False Claims Act

Kellogg Brown & Root Services, Inc. v. United States, ex rel. Carter (12-1497)

Questions Presented:

(1) Whether the Wartime Suspension of Limitations Act—a criminal code provision that tolls the statute of limitations for “any offense” involving fraud against the government “[w]hen the United States is at war,” 18 U.S.C. § 3287, and which this Court has instructed must be “narrowly construed” in favor of repose—applies to claims of *civil* fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling.

(2) Whether, contrary to the conclusion of numerous courts, the False Claims Act's so called “first-to-file” bar, 31 U.S.C. § 3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the government, while prohibiting repetitive, parasitic claims—functions as a “one-case-at-a-time” rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.

Summary:

The False Claims Act (FCA) imposes civil liability for submitting false claims to the government and allows private individuals to bring a *qui tam* action on the government's behalf to collect penalties. 31 U.S.C. § 3729(a). While the FCA has a six-year statute of limitations, the Wartime Suspension of Limitations Act (WSLA) tolls the statute of limitations for “any offense” of fraud against the United States during a war or authorized armed conflict. 18 U.S.C.

§ 3287. The first question presented is whether the WSLA applies to civil suits, and is triggered without a formal declaration of war. The FCA also has a “first-to-file” bar which prevents a person from bringing suit when the claim is based on the same underlying facts as a “pending” action. 31 U.S.C. § 3730(b)(5). The second question in this case is whether the FCA’s “first-to-file” bar permits a new and duplicative action to be brought once the first suit is no longer pending.

Respondent Carter worked for petitioners when they provided logistical support to the U.S. military in Iraq. He filed a qui tam action in federal district court alleging that petitioners made false claims to the United States, in violation of the FCA. The district court dismissed the claim based on the statute of limitations and the first-to-file bar.

The Fourth Circuit reversed. It held that the WSLA tolling provision applies to qui tam actions brought under the FCA, and that respondent’s suit was therefore timely. The court reasoned that the term “offense” naturally reaches both civil and criminal law violations. The court also concluded that the WSLA was triggered by Congress’s authorization of the use of military force in Iraq, even though it was not a formal declaration of war. The court also held that respondent’s suit is not precluded by the first-to-file bar. The court reasoned that the bar applies only when an earlier filed case remains pending, and not when a previously filed suit has been dismissed without judgment on the merits.

Petitioners argue that the WLSA’s tolling provision does not apply in this case for two reasons. First, they contend that the term “offense” in the WLSA refers to a crime, and that the WLSA therefore cannot toll civil actions. Second, they argue that a formal declaration of war is required to trigger the tolling provision. Petitioners also contend that the first-to-file bar precludes a later filed duplicative suit, regardless of whether the first suit remains pending. Petitioners argue that Congress used the term “pending” as a shorthand reference to the first action, not as a time limit on the bar.

Decision Below:

710 F.3d 171 (4th Cir. 2013)

Petitioners’ Counsel of Record:

John P. Elwood, Vinson & Elkins LLP

Respondent’s Counsel of Record:

David S. Stone, Stone & Magnanini LLP

Preemption – Natural Gas Act

ONEOK, Inc. v. Learjet, Inc. (13-271)

Question Presented:

Does the Natural Gas Act preempt state-law claims challenging industry practices that directly affect the wholesale natural gas market when those claims are asserted by litigants who purchased gas in retail transactions?

Summary:

Under the Natural Gas Act (NGA), the Federal Energy Regulatory Commission (FERC) has authority to regulate rates charged in the wholesale natural gas market and any practice “affecting such rate.” 15 U.S.C. § 717d(a). The NGA preempts any state regulation that falls within its scope. The question presented is whether a state law claim challenging a practice used in setting prices for retail sales is preempted by the NGA because the same practice affected rates for wholesale sales.

From 2000 to 2002, magazines published indices of sales based on the rates reported by market participants, and these indices were used to establish rates in both wholesale and retail sales. During that period, petitioners, sellers of natural gas, and respondents, purchasers of natural gas, used the indices to establish rates for retail sales. In 2005, respondents filed suit alleging that petitioners manipulated the indices through false reports and wash sales, in violation of California law. The district court ruled that the claims were preempted by the NGA.

The Ninth Circuit reversed, holding that claims based on retail sales were not preempted by the NGA. The court reasoned that the NGA carefully reserved regulation of retail sales to the States, and that extending preemption to a practice used in setting retail rates simply because that same practice affected wholesale rates would strip States of the ability to regulate retail sales.

Petitioners contend that respondents' claim of unlawful price manipulation is preempted by the NGA. Petitioners argue that it is irrelevant that respondents challenge only retail sales, not wholesale sales. Because the same practice was used in setting wholesale rates, petitioners contend, respondents' claim necessarily intrudes on FERC's exclusive authority to regulate any practice affecting wholesale rates.

Decision Below:

715 F.3d 716 (9th Cir. 2013).

Petitioners' Counsel of Record:

Neal Kumar Katyal, Hogan Lovells US LLP

Respondents' Counsel of Record:

Jennifer Gille Bacon, Polisnelli PC

Securities

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund (13-435)

Question Presented:

For purposes of a [claim under Section 11 of the Securities Act of 1933], may a plaintiff plead that a statement of opinion was “untrue” merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed—as the Second, Third, and Ninth Circuits have held?

Summary:

Section 11 of the Securities Act of 1933 imposes civil liability when a registration statement contains an untrue statement of material fact or omits to state a material fact. In *Virginia Bankshares*, the Supreme Court held that proof that the issuer subjectively did not believe the opinion and that the opinion was objectively false establishes a violation of Section 14(a). At issue in this case is whether proof of subjective falsity is a necessary element of a Section 11 claim relating to a statement of opinion, or whether proof of objective falsity is sufficient.

In connection with an offering of public stock, petitioner Omnicare issued a registration statement in which it expressed its belief that its practices complied with the law. Respondents, two pension funds that purchased shares of Omnicare, filed suit alleging that Omnicare's expression of belief that its practices complied with the law was false in violation of Section 11. The district court dismissed the claim on the ground that respondents failed to allege that Omnicare knew that any of its practices violated the law.

The Sixth Circuit reversed. It held that proof that an issuer knew that an expression of belief was false is not a necessary element of a Section 11 claim. It reasoned that such proof is

not necessary because Section 11 imposes strict liability for untrue statements. The court concluded that *Virginia Bankshares* tied its interpretation of Section 14(a) to a scienter requirement and therefore has no application to a Section 11 claim.

Petitioner argues that a Section 11 claim relating to a statement of opinion requires proof that the issuer did not subjectively believe the opinion. Petitioner argues that because the only statement of fact conveyed by a statement of belief is that the speaker held the belief, it necessarily follows that such a statement can be untrue as to a material fact only if the speaker did not actually hold the stated belief. Petitioner further argues that the holding in *Virginia Bankshares* that proof of subjective falsity is required to establish a Section 14(a) violation is also applicable to a Section 11 claim because that holding turned on when an opinion can be a false statement of fact, and not on any requirement of scienter.

Decision Below:

719 F.3d 498 (6th Cir. 2013)

Petitioners' Counsel of Record:

Kannon K. Shanmugam, Williams & Connolly LLP

Respondents' Counsel of Record:

Eric A. Isaacson, Robbins Geller Rudman & Dowd LLP

Tax

Alabama Department of Revenue v. CSX Transportation, Inc. (13-553)

Questions Presented:

(1) Whether a State “discriminates against a rail carrier” in violation of 49 U.S.C. §11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads’ competitors.

(2) Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. §11501(b)(4), a court should consider other aspects of the State’s tax scheme rather than focusing solely on the challenged tax provision.

Summary:

A provision of the Railroad Revitalization and Regulatory Reform Act (4-R Act) prohibits states from imposing a tax that discriminates against a rail carrier. The first question in this case is whether the relevant comparison class in determining the issue of discrimination consists of all businesses generally, or just the rail carrier’s competitors. The second question is whether, in determining whether a tax is discriminatory, a court should consider only the challenged provision, or whether it should consider the State’s tax policy as a whole.

Alabama generally imposes a 4% sales-and-use tax on the purchase of diesel fuel. Respondent CSX Transportation, Inc., an interstate rail carrier, is subject to that tax. Respondent’s competitors, motor and water carriers, are exempt from the diesel fuel tax. Motor carriers pay a 19¢-per-gallon excise tax on diesel fuel and water carriers are not taxed on diesel fuel at all. Respondent sued the Alabama Department of Revenue, claiming that the sales tax exemptions for motor and water carriers violate the 4-R Act. The district court ruled in favor of the State.

The Eleventh Circuit reversed. The court held that, in determining whether there is discrimination, the proper comparison is between a rail carrier and its competitors, not between rail carriers and all other businesses. Because the sales and use tax was imposed on rail carriers and not on their motor and water carrier competitors, the court held, that tax discriminates

against rail carriers. The court also held that, in determining whether there is discrimination, a court must look only to the challenged provision, and not to other provisions of the state's tax laws. The court therefore refused to consider whether the excise tax on motor carriers was comparable to the sales and use tax on rail carriers.

Petitioner argues that in determining whether there is discrimination against rail carriers, the proper comparison is to all other businesses, not just the railway carrier's competitors. Congress's use of the phrase "another" tax that discriminates, petitioner argues, points to the previous forms of discrimination Congress identified, all of which require a comparison with businesses generally. Petitioner further argues that a comparison to all businesses better achieves Congress's purpose of preventing mistreatment of nonresident rail carriers than a comparison to competitors who may also be outsiders. Finally, petitioner argues that in deciding whether there is discrimination, a court should consider the tax structure as a whole, not just the challenged provision.

Decision Below:

720 F.3d 863 (11th Cir. 2013)

Petitioner's Counsel of Record:

Andrew L. Brasher, Deputy Solicitor General, Office of Alabama Attorney General

Respondent's Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

***Direct Marketing Association v. Brohl* (13-1032)**

Question Presented:

Whether the Tax Injunction Act bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration?

Summary:

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, prohibits federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." In *Hibbs v. Winn*, the Court held that the TIA has been applied only in cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes. The issue in this case is whether the Act's jurisdictional limits apply to a notice and reporting requirement imposed on a non-taxpayer that facilitates the collection of a tax owed by others.

Colorado has a 2.9% tax on the sale or use of tangible goods within the state. Out-of-state retailers are not required to collect the tax; instead Colorado purchasers must pay it directly. In an effort to increase compliance with the use tax, Colorado passed a statute requiring retailers who do not collect sales tax, but still sell to Colorado purchasers, to notify those purchasers of the use tax, and to send an annual purchase summary to both the customer and the Colorado Department of Revenue. Petitioner Direct Marketing Association, a group of businesses that market products remotely, sued respondent, the Executive Director of the Colorado Department of Revenue, to enjoin enforcement of the notice and reporting requirements. A federal district court held that the requirements violate the Commerce Clause and entered a permanent injunction.

The Tenth Circuit reversed, holding that the TIA bars petitioner's suit. The court held that petitioner's suit, if successful, would restrain the collection of taxes, because it would restrict the state's chosen method of increasing the collection of taxes from consumers. The

court distinguished *Hibbs* on the ground that a successful challenge to the law at issue in that case would have increased tax revenues, whereas the present challenge, if successful, would reduce the flow of revenue to the State.

Petitioner relies on *Hibbs* to argue that the TIA only applies in cases in which state taxpayers seek to avoid tax payments. Petitioner contends that since the Colorado notification and reporting law does not require them to pay or collect a tax, their suit challenging that law falls outside the TIA. Petitioner further argues that the TIA extends only to suits that would directly bar the collection of taxes, not to suits that seek to enjoin laws that indirectly enhance the collection of taxes.

Decision Below:

735 F.3d 904 (10th Cir. 2013)

Petitioner’s Counsel of Record:

George S. Isaacson, Brann & Isaacson

Respondent’s Counsel of Record:

Melanie J. Snyder, Office of the Attorney General of Colorado

Telecommunications Act

***T-Mobile South, LLC v. City of Roswell, Georgia* (13-975)**

Question Presented:

The question presented is whether a document from a state or local government stating that an application [to place a person wireless service facility] has been denied, but providing no reasons whatsoever for the denial can satisfy [the Telecommunications Act’s] “in writing” requirement.

Summary:

The Telecommunications Act of 1996 provides that a local government’s decision to “deny” an application to build a cell tower “shall be in writing and supported by substantial evidence contained in a written record.” The question presented in this case is whether the “writing” required by the Act must include the reasons for the denial, or whether reference to the minutes of a public hearing is sufficient.

Petitioner T-Mobile submitted a request to respondent City of Roswell, Georgia, for a permit to build a cell tower. After holding a public hearing, the City Council voted unanimously to reject petitioner’s request. During the hearing, both citizens and council members expressed various reasons for opposing the request. Subsequently, the City sent a letter to petitioner notifying petitioner of the City’s decision to deny petitioner’s permit application. The letter also informed petitioner that it could obtain minutes of the public hearing from the city clerk. Petitioner filed suit in federal district court challenging the denial. The district court ruled in petitioner’s favor, concluding that the City failed to satisfy the Act’s “in writing” requirement.

Relying on its recent ruling in *T-Mobile South LLC v. City of Milton*, the Eleventh Circuit reversed. In *Milton*, the Eleventh Circuit held that the Act does not require the reasons for a denial to appear in the same document as the written denial. The court concluded that the “in writing” requirement is satisfied if the applicant has access to documents containing the reasons for the denial.

Petitioner contends that the “in writing” requirement is satisfied only if the written denial explains the reasons for the denial. Petitioner argues that the statutory requirement that a denial must be “supported by substantial evidence” necessarily implies that the written denial must include the reasons for the denial. Petitioner further argues that the City’s reference to the

minutes of the public hearing did not satisfy the “in writing” requirement. While the minutes reflect that citizens and individual council members opposed the permit for various reasons, petitioner argues, there is nothing in the minutes that explains the City’s reasons for the denial.

Decision Below:

731 F.3d 1213 (11th Cir. 2013)

Petitioner’s Counsel of Record:

T. Scott Thompson, Davis Wright Tremaine LLP

Respondent’s Counsel of Record:

Richard A. Carothers, Carothers & Mitchell, LLC

Other Public Law

Administrative Law

Perez v. Mortgage Bankers Association (13-1041)

Nickols v. Mortgage Bankers Association (13-1052)

Question Presented:

Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

Summary:

The Administrative Procedure Act (APA) generally requires federal agencies to engage in notice-and-comment rulemaking before issuing new regulations, or amending or repealing existing regulations. The APA creates an exception to that requirement for “interpretative rules.” At issue in this case is whether an agency must engage in notice-and-comment rulemaking before issuing an interpretation that significantly alters a previous agency interpretation of a substantive regulation.

The Fair Labor Standards Act exempts administrative employees from overtime pay requirements. Pursuant to a grant of statutory authority, the Department of Labor (DOL) issued substantive regulations defining the scope of the administrative employee exemption. At one time, DOL interpreted its administrative employee regulations to cover mortgage loan officers. Subsequently, DOL reversed course and concluded that mortgage loan officers are not administrative employees within the meaning of its regulations. The Mortgage Bankers Association (respondent) sued the Secretary of Labor (petitioner), alleging that the change in its interpretation violated the APA because DOL did not employ notice-and-comment rulemaking. Former loan officers (co-petitioners) intervened. The district court dismissed respondent’s challenge.

The D.C. Circuit reversed. Relying on its precedent in *Paralyzed Veterans of America v. D.C. Arena L.P.*, the court held that DOL could not significantly alter a definitive interpretation without notice-and-comment rulemaking. The court reasoned that a substantial change in a definitive interpretation amounts to a change in the regulation itself, necessitating notice-and-comment rulemaking.

Petitioners argue that the APA explicitly exempts interpretive rules from notice-and-comment rulemaking and that the exemption applies regardless of whether the interpretation represents a significant change from a previous definitive interpretation. Petitioners also argue that the courts cannot impose greater procedural requirements on agency rulemaking than those that Congress has dictated.

Decision Below:

720 F.3d 966 (D.C. Cir. 2013)

Petitioners' Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States (13-1041)

Adam William Hansen, Nichols Kaster, LLP (13-1052)

Respondent's Counsel of Record:

Allyson N. Ho, Morgan, Lewis & Bockius LLP

Bankruptcy

Wellness International Network, Ltd. v. Sharif (13-935)

Questions Presented:

(1) Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

(2) Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

Summary:

In *Stern v. Marshall*, the Supreme Court held that Article III precludes a bankruptcy court from entering final judgment on a claim unless the claim either stems from the bankruptcy itself or is necessarily resolved in the claims allowance process. The first question presented by this case is whether a claim that certain property in the debtor's possession belongs to the bankruptcy estate stems from the bankruptcy itself when resolution of that claim turns on state property law. The second question presented is whether a bankruptcy court may enter a final judgment on a claim that Article III would otherwise preclude it from adjudicating based on the consent of the parties, and if so, whether such consent may be implied.

Respondent Sharif filed for Chapter 7 bankruptcy. Petitioner Wellness International Network, Ltd. (WIN), one of his creditors, filed suit under 11 U.S.C. § 541 seeking to block Sharif's discharge. WIN also sought a declaratory judgment that assets that Sharif purportedly held in trust were property of the bankruptcy estate. The bankruptcy court issued a judgment, denying Sharif's discharge and declaring that the purported trust was part of the bankruptcy estate. The district court affirmed the bankruptcy court's judgment.

The Seventh Circuit reversed in relevant part. The court held that the bankruptcy court did not have authority to adjudicate whether the purported trust was part of the estate because the resolution of that claim turned on state property law and therefore did not stem from the bankruptcy process. The court further held that the litigants could not consent to the bankruptcy court's adjudication of that claim.

Petitioners contend that Article III permits a bankruptcy court to adjudicate a claim that property in the debtor's possession belongs to the bankruptcy estate because such a claim stems from the bankruptcy itself. While such a claim depends on state property law, petitioners argue, it has no existence independent of the bankruptcy process, and its adjudication is essential to the effective functioning of that process. Petitioners also contend that Article III permits a bankruptcy court to enter final judgment on a claim when litigants implicitly consent to such an adjudication.

Decision Below:

727 F.3d 751 (7th Cir. 2013)

Petitioners' Counsel of Record:

Catherine Steege, Jenner & Block LLP

Respondent's Counsel of Record:

William J. Stevens, Law Office of William J. Stevens

Immigration*Mellouli v. Holder* (13-1034)**Question Presented:**

To trigger deportability under [the controlled substances provision of The Immigration and Nationality Act], must the government prove the connection between a drug paraphernalia conviction and a substance listed in section 802 of the Controlled Substances Act?

Summary:

Under the Immigration and Nationality Act (INA), the government can deport a person convicted of violating a state law “relating to” a controlled substance as defined by the Controlled Substances Act. That Act lists five schedules of controlled substances. Kansas law prohibits the use of drug paraphernalia for the purpose of storing controlled substances. Its list of drugs that are illegal to possess largely overlaps with the list of federally controlled substances, but includes some that are not federally controlled. At issue in this case is whether a person may be deported based on a state conviction for possession of drug paraphernalia without proof that the conviction was for one of the federally controlled substances.

Petitioner Mellouli, a Tunisian citizen, was a lawful permanent resident of the United States. Mellouli pleaded guilty to the state misdemeanor crime of possessing drug paraphernalia, without specifying the drug possessed. The government sought removal based on that conviction. An Immigration Judge ordered his removal, and the Board of Immigration Appeals (BIA) affirmed.

The Eighth Circuit denied the petition for review. The court held that a state conviction can relate to a federally controlled substance even when the government fails to prove that the conviction necessarily involved one of those substances. Applying *Chevron*, the court reasoned that the INA reasonably concluded that state drug convictions are categorically related to federally controlled substances because there is large overlap between state-regulated drugs and federally controlled substances.

Petitioner contends that the text of the INA unambiguously requires the government to establish that a state drug conviction involved a specific federally controlled substance. Petitioner further argues that the text forecloses the BIA’s view that a state drug conviction relates to a federally controlled substance simply because there is a large overlap between the substances regulated by the states and federally controlled substances.

Decision below:

719 F.3d 995 (8th Cir. 2013)

Petitioner Counsel of Record:

Jon Laramore, Faegre Baker Daniels

Respondent Counsel of Record:

Donald B. Verrilli Jr., Solicitor General of the United States

Religious Land Use and Institutionalized Persons Act

Holt v. Hobbs (13-6827)

Question Presented:

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc *et sec.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

Summary:

The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits a prison institution from imposing a substantial burden on an inmate's religious exercise unless that imposition is the least restrictive means of furthering a compelling governmental interest. At issue in this case is whether the Arkansas Department of Correction's prohibition against petitioner growing a one-half-inch beard in accordance with his religious faith violates RLUIPA.

Petitioner Gregory Holt is an inmate at a prison facility operated by the Arkansas Department of Correction (ADC). Petitioner subscribes to the Islamic belief that men must grow and maintain a beard. The ADC has a general policy prohibiting beards of any length. If an inmate has a dermatological condition, however, the ADC allows for a quarter-inch beard. After facing disciplinary action for refusing to shave, Holt filed suit in federal district court, seeking an injunction that would permit him to maintain his half-inch beard. The district court dismissed petitioner's complaint.

The Eighth Circuit affirmed. It held that that the ADC had met its burden under RLUIPA of establishing that the grooming policy was the least restrictive means of furthering its interest in security. The court ruled that deference to the judgment of prison officials outweighed any evidence of alternate prison policies in other jurisdictions that allow inmates to wear beards.

Petitioner contends that the ADC failed to justify its failure to make an exception to its grooming policy to allow him to maintain a one-half-inch beard, because it failed to show that it could not pursue its interest in security through the less restrictive means followed in at least 40 other state and federal prison systems. In particular, petitioner argues that the ADC's concern about the hiding of contraband is fanciful, and could be readily served by searching petitioner's beard. He contends that the risk that he could change his appearance if he escaped could be addressed by taking two photos of him, one with a beard and one without. He argues that the ADC's assertion that it would have to monitor compliance with the half-inch beard policy for 15,000 prisoners is unrealistic because only persons who have a religious reason for wearing a beard would have to be monitored. Finally, petitioner contends that the ADC's concern that any exception would provoke resentment among other inmates is not a permissible basis for failing to comply with RLUIPA.

Decision Below:

509 Fed.Appx. 561 (8th Cir. 2013)

Petitioner's Counsel of Record:

Douglas Laycock, University of Virginia School of Law

Respondents' Counsel of Record:

Christine Ann Cryer, Office of the Attorney General of Arkansas